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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 23 Cr. 430 (KPF)

ROMAN STORM,

Defendant.

Oral Argument
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New York, N.Y.
October 10, 2024
4:00 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: NATHAN M. REHN II
KEVIN MOSLEY
BENJAMIN A. GIANFORTI
BEN ARAD
Assistant United States Attorneys

WAYMAKER, LLP
Attorneys for Defendant
BY: BRIAN E. KLEIN
KEVIN CASEY
KERI AXEL

HECKER FINK, LLP
Attorneys for Defendant
BY: DAVID E. PATTON

(Case called)

THE DEPUTY CLERK: Starting with the government, counsel, note your appearance.

MR. REHN: Good afternoon, your Honor. This is Than Rehn appearing for the United States. I'm joined here in my office by Ben Gianforti. We also have on the line Kevin Mosley and Ben Arad.

THE COURT: Thank you, and good afternoon to each of you. And representing Mr. Storm, do I have Mr. Klein and others?

MR. KLEIN: Good afternoon, your Honor. Thank you again for accommodating us with the telephonic conference. You have myself, Keri Axel Kevin Casey, and we also have David Patton. He's dialed in. He couldn't get into this line, but he won't be speaking, but he's also listening in. And we also have our client who's dialed in Mr. Storm.

THE COURT: Thank you very much, and good afternoon to each of you. Mr. Klein, you sort of suggested this in your response to me, but I believe that you and your client have discussed his right to have this proceeding take place in person and that he is waiving that right?

MR. KLEIN: That is correct, your Honor.

THE COURT: Let me please confirm that with Mr. Storm. May I speak with him directly, Mr. Klein?

MR. KLEIN: Yes.

THE COURT: Thank you. Mr. Storm, first of all I want to be sure you can hear us this afternoon. Can you, sir?

THE DEFENDANT: Good afternoon, yes. Yes, I can hear you well.

THE COURT: Okay. Good. My deputy also advises me just if you're wondering that there are also eight listen only participants on this conference as well. I just want to make sure that's there for the record. Mr. Storm, your attorney and I have been speaking and as happened at a prior conference of ours, I believed it was easier for everyone to participate telephonically just given the distance folks would have to travel. Mr. Klein advises me that you and he have discussed the matter, that you're aware of your rights to have this proceeding take place in person; and that you are consenting or waiving your right to have it take place in person and consenting to a telephonic proceeding. Is all of that correct, sir?

THE DEFENDANT: Yes, that's all correct. Thank you.

THE COURT: Mr. Storm, thank you for letting me know. Friends, I've been thinking about everyone's submissions. I've been doing a lot of talking with a lot of other judges. And I mentioned I did have a few questions that I'd like to ask the parties just to fill in some gaps that I have, or perhaps to dispel some misimpressions that I have, so let me do that. And then depending on your answers, I will either have the ability

to give you a decision immediately, or I might need a little bit of time. So let's hope for the former. Thank you.

Mr. Rehn, I'm told I should be directing government inquiries to you. Is that correct, sir?

MR. REHN: Yes, your Honor.

THE COURT: Perhaps I am misreading the parties' submissions, but there was a suggestion in the defense submission that the government is taking a very textualist approach to the Jencks Act, and that they're planning on not producing 3500 material until after the witness' testimony. Is that correct or have I just misunderstood?

MR. REHN: No, your Honor. We've been I think as we say in our letter attempting to have a discussion with them across a range of issues. And as part of that discussion, we have expressed a willingness to produce materials pursuant to Section 3500 in advance of trial. And have hopes that that would be part of an agreed upon agreement as to all pretrial disclosures. Because we haven't been able to reach that agreement, we haven't yet decided the timing for those disclosures in particular.

THE COURT: And I guess I understand that a little better than I did a moment ago. Is it actually the government's contemplation -- if I can use the Failla parlance, is there a world in which you would not produce 3500 material until after the witness testified?

MR. REHN: That is very much not our practice, so I don't expect that would be the world that we would anticipate going into the trial. I do think the timing of those disclosures is something we frequently include in our discussions with defense counsel about a range of hoped for agreed upon pretrial disclosures. And so the precise timing of those disclosures is something that we are continuing to include in our discussions with defense counsel.

THE COURT: I see. The way I'm looking at it, Mr. Rehn, we're here. You're talking to me because you haven't worked that out. Is it possible that I could suggest a production schedule of 3500 material to the parties?

MR. REHN: There's precedent in the Circuit that says that Rule 3500 is not something that the government can be ordered to do in advance of the specific time that's set forth in the statute.

THE COURT: And please, sir, let me be very clear about the question I asked you. That's exactly why I use the term "suggest." I'm familiar with *In Re United States*, 834 F.2d 283 from 1987 which tells me that, so I get it. I guess what I'm asking is, you're talking about negotiating things, but there are some issues that I imagine that the parties or that the parties do want me to resolve. Is it your contemplation that after I resolve the issues of expert witness disclosures and advice of counsel disclosures, that then the parties are

going to negotiate the 3500 material?

MR. REHN: Your Honor, I think the position we've articulated in our letter, it reflects our view that the best thing to do is figure out a way to have pretrial disclosures to facilitate the efficient presentation of evidence at trial without unnecessary interruptions. And my expectation is that we will produce 3500 material in a manner that allows for that after the Court resolves our issues relating to the expert disclosures.

THE COURT: Okay.

MR. REHN: And our usual practice would be to produce it in advance of trial.

THE COURT: Yes, I know. Again, I am aware of Second Circuit precedent on this issue, that's why I'm couching in terms of suggestion or a request. I will say I don't know that I knew, or at least did not focus on this idea that a judge couldn't order earlier disclosures. Because heaven knows, I've both ordered and been ordered to produce things earlier. I don't remember your office invoking *In Re United States* cases of that type previously, but we all know that they are there.

Mr. Rehn, that actually leads me to my next question which is this: As I understand, the decision, the *In Re United States* decision from 1987, what it stands for is the proposition that a court's inherent power does not trump the production schedule or the production deadline that's listed in

the Jencks Act, such that a district court lacks the power to order production on an earlier timetable. Perhaps I'm overstating the issue, but that's how I'm looking at it. If you hold that same view of the case, could you help me understand how I can reconcile the inherent power I have or don't have to order early 3500 material disclosure with the inherent power I have or don't have to order disclosure of expert witness disclosures under Rule 16 without the triggering event of the defense making a request for them?

MR. REHN: Yes, your Honor. So first off the issue of the Court ordering pretrial expert disclosures is, as far as we can tell, an issue of first impression, not just in this district, but in this Circuit. So unlike with respect to 3500, there's no binding precedent on this issue from any prior court. There are some decisions from other district courts that are cited in the parties' letters.

THE COURT: Yes.

MR. REHN: But I think the core principle here is that there's Rule 16 in the Federal Rules of Criminal Procedure which does provide for certain provisions for pretrial disclosures. And in addition to that, the actual presentation of evidence at trial is governed by the Federal Rules of Evidence which include Rule of Evidence 702. And under Rule of Evidence 702, the Court has an inherent gatekeeping authority pursuant to the Supreme Court's decision in *Daubert* and *Kumho*

Tire and has discretion in determining how to exercise that gatekeeping authority. What we're simply saying is that there's basically apparently two ways that are being proposed here for the Court to exercise its gatekeeping discretion. One which would involve resolving evidentiary objections to expert testimony shortly in advance of trial, and one which would involve a potentially lengthy mid-trial adjournment, possibly multiple mid-trial adjournments to allow the parties to review and respond to each other's disclosures; and then present any potential objections to the Court at that point in time.

And we would suggest that the Court should exercise its discretion that is clearly afforded it pursuant to the *Daubert* line of cases to order that proceeding in such a way to avoid that sort of a mid-trial adjournment. And the law does contemplate that the trial court has discretion to decide when and how to address expert objections.

THE COURT: Let me ask a question in the 702 vein. You're familiar with -- and this may sound a little bit over-academic. That's the appellate lawyer in me, so please excuse me. You're familiar, sir, with the concept of the if, as or when subpoena?

MR. REHN: Yes, your Honor.

THE COURT: If the government filed a *Daubert* motion expressing concern about the reliability or about the admissibility of Mr. Storm's contemplated expert testimony,

which as yet has not been foreshadowed or introduced. Do you believe that I would have the power to order them to disclose sufficient information to allow me to make findings under Rule 702, under perhaps Rule 403, and under the *Daubert* line of cases, is that the argument that you're making to me now? That you could today file a motion saying, we are worried that this stuff may not be admissible; therefore, we're asking to require them to disclose it and to set a schedule for a *Daubert* hearing, or do you think it's something I can do sua sponte or both?

MR. REHN: Well, I think that's what we're essentially saying in our letter motion. I don't think we currently have an articulable basis to object to expert testimony in the contents of which we don't know. And so we're aware from our conversations with defense counsel that they are contemplating certain experts. We're aware from the motions they filed in the case that that is likely to involve technical issues relating to things like cryptocurrency, transactions, computer software, issues that involve quite a bit of work to even understand for a lay person like myself usually with the help of our own experts to try to figure these issues out.

And so in order to be able to -- for both parties to be able to review the disclosures, decide whether there are things that aren't proper expert testimony, and then explain them in briefing to the Court, and for the Court then to have

the opportunity to rule on those would take a reasonable amount of time. Even a 24-hour adjournment in the midst of trial I don't think would probably be enough to do that level of work. And so what we're saying is, in light of the clear anticipated complicated expert testimony that's at issue in this case, it's an appropriate case for the Court to exercise discretion to have those proceedings take place in advance of the time the jury is sworn.

THE COURT: Do you think, sir, my authority rises, if at all, from the Federal Rules of Evidence and not from Rule 16 and not from my inherent powers; or do you think it's a combination? By the way, I'm not saying I agree with you. I just want to make sure I understand the point.

MR. REHN: I think we take the point that is raised by defense counsel that the specific aspects of Rule 16 that require disclosures are triggered by defense request for disclosures. But we do think that the underlying purpose of Rule 16 clearly contemplates that what the advisory committee was trying to do was avoid mid-trial surprise, and ensure that fair and efficient presentation of evidence for the jury. And so it should be considered in accordance with the Federal Rules of that Evidence that are going to govern this expert testimony. And under those rules of evidence, there's I don't think any question that the trial court does have discretion to decide in the words of the Supreme Court in the *Kumho Tire*

decision, 526 U.S. at 152 "whether or when special briefing or other proceedings are needed to investigate reliability." And so there is an avenue under Rule 702 to set the trial proceedings up in such a way so that the Court is best positioned to exercise the gatekeeping authority without creating a problem with a mid-trial adjournment.

THE COURT: Okay. Thank you. Just one moment, please. Mr. Rehn, your adversary has suggested that there's nothing that prevents the government from disclosing the expert testimony and information on its own. I presume you're just going to tell me that yes you can, but you would much prefer to disclose it in some sort of negotiated resolution with the defense. Yes?

MR. REHN: Yes, or a schedule ordered by the Court. I think there are considerations of fairness that have to be taken into account, along with conditions considerations of efficiency.

THE COURT: Okay. Thank you. Mr. Klein, could I hear from you, sir. I have a little better sense now about the government's perspective on the 3500 material. Would you please engage in the discussion I was just having with counsel about the Federal Rules of Evidence recognizing, sir, that perhaps similar arguments may have been made to the judge in Washington?

MR. KLEIN: Your Honor, I think Rule 16 is very clear

and was crafted in a way that is clear, and that Rule 702 even read that way doesn't trump it, otherwise it would drive a hole through the rule.

THE COURT: Okay. Is there anything -- and, sir, that was really -- I have candidly more questions for the government than I have for the defense. But if there's anything else you'd like to comment on based on the conversation I had with Mr. Rehn, please tell me now?

MR. KLEIN: Two things. One is, the government did tell us they weren't going to give 3500 material unless we gave defense expert disclosures, and that was the real hangup in our negotiations. We really do and have consistently wanted a holistic schedule as I think you saw in our letter. But the second point is, there's one point for consideration you haven't touched on is the advice of counsel disclosure. And I think we noted that there's an issue of fairness there if the 3500 materials aren't being handed over. We've been working diligently on a set team as a defense. And sort of in light of sometime that has past, some discovery and us delaying I think makes one amendment to our request in our letter that 404(b) and advice of counsel, we'd be given two additional weeks until October 28.

In our letter we had put in October 14, which is next week, so that's actually this coming Monday. So I just wanted to note that our request now is that the schedule would be as

outlined in our letter, but with the October 14th date moved to October 28.

THE COURT: Just so that I'm clear, sir, you'd be willing to produce advice of counsel and 404(b) notice only if the entirety of your schedule is adopted as well, sir. Am I correct? Let me be more pointed. Okay. Let's say that I am not ordering production one month in advance of 3500 material. Are you still willing to give early notice of the advice of counsel or not? I'm fine either way.

MR. KLEIN: I think we would need to think about that, your Honor. Again, our contemplated schedule is November 8. I think we would want -- and again, as we noted at the end, it's sort of an issue of fairness. And I think we felt our schedule that we proposed balances competing concerns by both parties, but also giving everybody time to review and analyze stuff. So if the government is only suggested to produce 3500 or only ordered, however it's phrased a week or two in front of trial, we would want sufficiently more time to assess our advice of counsel defense. So maybe that's not as a direct answer you would like, but I just --

THE COURT: Well, you're exactly right. It's not as a direct answer as I would like. For me, sir, the issue is this. I disagree with the defense's effort to link 3500 material and advice of counsel defense. I don't see them as joined at the hip as you do. That doesn't mean that I'm not going to ask the

government to produce it early. Although as you've heard Mr. Rehn tell me gently, I don't have the authority to order it. But I am not conditioning the advice of counsel disclosure on the 3500 material, that's not something that I plan to do in resolving this. You'll see in a few moments because I need a few moments to think about what you all just told me, and I will then give you my decision. But you'll see I have uncoupled 3500 material and advice of counsel.

MR. KLEIN: We would still ask for October 28 for the advice of counsel defense. If the government's not going to be producing -- even we understand your Honor is not coupling them, we still view them as coupled respectfully. And we would ask for additional time past the 28th, so that's our position.

THE COURT: Okay. And let me say this as well, let's talk about what we maybe agree on, which by the way may not be much. On page three of your letter, your September 25th letter, sir, there are certain things that are bold, and those are things that I ordered. Obviously I don't plan on changing the things that I have ordered, although I'll listen to the parties if I needed to. It was my contemplation that the 404(b) disclosures would be made in the motions *in limine*, that I hear about it first in the motions *in limine*, parties seeking to produce 404(b) evidence would do in the motions *in limine*. And then I get the opposition one week later telling me why that shouldn't happen.

So while you're asking for the 28th of October for that disclosure, in my mind it was going to be disclosed on the 4th of November.

MR. KLEIN: Your Honor, one point with that, sometimes it's helpful, and the reason why we asked for it a little earlier is sometimes we're able to negotiate a resolution of the 404(b) issues that prevent the need for 404(b) motions. So that is one reason we contemplated it early. I've had that in the past with the government where they notice something. You talk about it with them, and then you reach an agreement so your Honor doesn't have as many motions in front of the court. That's one reason we put it in.

THE COURT: Well, Mr. Rehn, opposition to that friendly moment, sir.

MR. REHN: It was also our view -- and generally it's the practice that we would do the 404(b) as part of the motions *in limine*, but I don't know if we're necessarily opposed to a disclosure somewhat in advance of that.

THE COURT: Well, one week in advance of that suggest -- the reason to do it, which I know you know, is that if you can agree on it, then you don't have to write me a motion, and then I don't have to decide a motion. That's not a crazy thing, so I'm okay with that. But wait. Mr. Klein, does that mean that you're also disclosing advice of counsel on that day, or is that something you're still thinking about, sir?

MR. KLEIN: Your Honor, that would be October 28. Just to be clear, we were requesting October 28, for both of those. Now again, I'm not trying to be difficult with the 3500 on November 8th, but again we do see the benefit -- and I just outlined it too, of getting 404(b) at least a week in advance so we can try to work out a resolution and avoid unnecessary motions. Sounds like we have agreement with the government.

THE COURT: Okay. Let me be more explicit then with what I was just saying. Earlier in this conversation you said to me that your thought was -- and indeed, in your letter it was originally October 14th, but it is now October 28 -- the idea of disclosing 404(b) and the advice of counsel defense. I believe that we just agreed -- and if not, I can order it -- that the government and you -- well, I guess really the government -- provide 404(b) notice by the 28th of October. So that you've got. And then we've got our motions. Otherwise the November 4th, November 11, November 19th dates remain the same. I guess I'm asking whether having negotiated that resolution, you're willing to disclose advice of counsel on the 28th of October, or whether you want to hear more from me before you make that decision? I just want to know.

MR. KLEIN: Your Honor, in light of that, I think we will agree to the advice of counsel on the 28th; but again, with the idea that the government will be producing 3500 sufficiently in advance of trial, whether you give us the date

we ask for, which we think is appropriate for fairness. So I think we are finding common ground here.

THE COURT: Okay. Well, I'm sad for the amount of time we spent looking at advice of counsel defense, but if I can bring the parties to a negotiated resolution all the better. All right. Mr. Rehn, still there, sir?

MR. REHN: Yes, your Honor.

THE COURT: Okay. Mr. Rehn, we now have a date of October 28th for the 404(b) notice and the advice of counsel disclosure. We've got -- otherwise my dates are set. Do you have a thought about 3500 material, sir? Because, remember, we've been talking about negotiation, but that's sort of what we've devolved to doing in this call. Do you have a position, or are you still thinking about that, sir?

MR. REHN: Your Honor, I think in light of this discussion, we do intend to produce the 3500 material in advance of trial. I think the 8th would be a challenge just given the number of other things that are going to be done that week. So I would ask for probably the -- when I say ask, I would sort of propose that we would plan on producing it more like the following Wednesday or something.

THE COURT: Okay. All right. The 13, November 13th, for 3500. That actually sounds great to me. And Mr. Klein is not going to tell me that he objects because that is fair. What about the exhibit and witness list from the 18th of

November, sir, is that something the government can do?

MR. REHN: One moment, your Honor.

THE COURT: Of course.

MR. REHN: Your Honor, I think we can work with that deadline.

THE COURT: Okay. All right. So that means we have many things resolved. But, Mr. Klein, I'm going back to you, sir. You've gotten a lot of what you've asked for, which is great. Mr. Klein, what about expert witness disclosures? Are we still there? Is that something I need to resolve, or are we in a really conciliatory mood and you might propose something with the government?

MR. KLEIN: Your Honor, we had talked to them about disclosures short of current Rule 16. They've rejected those each time we raise those.

THE COURT: And I wouldn't ask them for that either. I agree. I don't think that that's not -- that won't cut it. I guess is there otherwise, what, the plan is to just disclose at trial?

MR. KLEIN: So, your Honor, I think when we disclose a witness list, we would have to put the name of an expert that we might call in there just to be clear. I think that is something we would contemplate doing. It's not voluntarily or however you want to look at it, but I think our plan is to stick with Rule 16. Maybe in the meantime we are able to

negotiate something with the government. We will continue to try to do so. To be clear, we're not giving up on that front, so I don't know if they change their mind on this call. But maybe after this hearing we all have time to think about it, we'll be able to reach a resolution. That's what happened in the Thompson case that was referenced in both our briefs.

THE COURT: I'm familiar with Thompson. Mr. Klein, let me be more precise, sir, excuse me. I think I was being a little bit too oblique. I have in front of me an oral decision resolving the parties' dispute about Rule 16. I can give it, or I cannot give it because the parties are going to continue to negotiate it. If you're not today comfortable making a commitment or continuing to negotiate with the government regarding the disclosure in accordance with the current version of Rule 16 in terms of the content, then I can proceed with the oral decision, or I can give you more of a chance to speak. The reason I'm asking, sir, is we were getting along so well for a few minutes there, and I do believe ultimately this trial is better if the parties can negotiate it. But I want to give you that option, but if that's where you are, then I'll give my decision.

MR. KLEIN: Your Honor, that's where we are.

THE COURT: That's an answer and that is fine. Then let me do this, please. Just give me a moment. I have notes, but I have notes that I'm sort of annotating in light of the

discussions we've been having today. And I just want to be sure that they've not been rendered dated by our discussions today. Okay. I'll ask for everyone's attention. I'll ask you to please mute your lines, and I will beg your indulgence as I read this into the record. My intention this afternoon is not to read into the record a lot of the applicable case law and statutes and rules. I know the parties know what they are. I don't think they aid the transcript to have me read them word for word into the record, so I'll make reference to them, and I'll be incorporating some of them by reference.

So I begin by thanking you, and I guess I have more to thank you for than when we started this conversation because at least part of this motion seems to have resolved itself, although I'll talk about that in a little while. So thanks for that. Let me tell you also that in anticipation of this decision, the way that I approached it given the paucity of case law in the issue was to reach out to a rather large number of my colleagues here in the Southern District to discuss the parties' competing views on these issues. And I actually received a fair amount of feedback from my colleagues which was great for me. And I analogize it -- again, this is the appellate lawyer in me -- to like a mini *en banc* of Southern District judges on these areas.

And as to some of the issues I'm going to discuss, there was sort of a universal consensus. As to others, what

I'm going to outline is my position in the majority view. I'll also let the parties know that I engaged in extensive conversations with Judge Subramanian, who if you're wondering was much less sanguine about the conduct of the Eisenberg trial than defense counsel recalls; and who really would have preferred to hashed out these issues in full in advance of trial rather than mid-trial. But I also had a very lengthy and very helpful chat with Judge Liman, who's just a very smart man as all of you know who did a lot of work on the advice of counsel defense in the Ray case, but also had a lot of things to say about Rule 16. So my decision today involved and incorporates the wisdom of those two judges and the others judges with whom I've spoken.

So I understand and you understand that the rules at issue here include Federal Rule of Criminal Procedure 16, in particular Subsections (a)(1)(G) and (b)(1)(C). I've looked at the advisory committee notes, in particular the advisory committee notes, the 1997 and 2022 amendments. The parties, at least the government, has suggested that Federal Rule of Criminal Procedure 57 might assist me in its Subsection B. And I've looked at the Federal Rules of Evidence, and I focused mostly on Rule 104, Rule 403, Rule 702, and some of the others in the 700 series. And the parties know what the parties' positions are with respect to the timing of expert disclosures. And I do and I want to underscore I appreciate everyone's

efforts to come to a holistic agreement on these issues because it takes up less of everyone's time. And so really I to appreciate that. And I also do appreciate the opportunity this afternoon to speak with the parties about what they really were intending to do and what their thoughts were.

As I suggested in my conversations with Mr. Klein, I don't condition Rule 3500 material and the advice of counsel defense. I don't condition Rule 3500 material and expert witness disclosures. I think that that's a little bit different, but I understand his position on it. I have looked at, as I mentioned, the case on the issue, the *Thompson* case and the *Impastato* case that were cited to me, although *Impastato* predates it. I did reach out to a number of my colleagues. And I'll tell you that the majority of the colleagues who responded to me actually were agreed or believed that I had the authority under my inherent power to set a timetable for disclosure. And let me just put that a little bit differently. These judges felt that while Rule 16 set forth the content of the disclosures and a mechanism for ensuring the fairness of pretrial disclosures, that there came a point in the trial process where the Court's inherent power to control the progress of the trial, the Court's concerns about not wasting jury time, the Court's need to schedule a pretrial as distinguished from mid-trial hearings interest the calculus. The belief was that the trial judge's duty to

control the trial process so that the jury can render a just verdict allowed the Court and indeed required the Court to set schedules so that admissible evidence was presented in a timely and efficient manner.

One of my colleagues wrote back to me and said specifically, we can't let gamesmanship trump justice. And so I thought about my inherent powers, and I would love to just very easily say that these judges are correct. I also know that the advisory committee notes at least suggest that a criminal defendant could not strategically avoid his or her obligation to make timely disclosures by avoiding actions that trigger disclosure obligations until trial. And by the way as a parenthetical here, I can't believe that the rules committee which was seeking to enhance the detail and the timeliness of disclosures would have enshrined or wanted to enshrine such gamesmanship. But there's language in the advisory committee notes that suggest that I can order disclosures in order to ensure enforceable deadlines. And that seems to me that I have that power even where one of the parties was seeking to delay triggering -- that party being the defense -- seeking to delay triggering the disclosure obligation. But that's where we are. If it turns out that my colleagues are wrong, and I don't have the inherent power to overcome the triggering import of Rule 16, let me say this: I absolutely have other sources of authority to obtain this information. And here I agree with

the arguments that the government is making today about my ability under the Federal Rules of Evidence. And to me that includes Federal Rules of Evidence 104 which obligates me to decide certain preliminary questions of admissibility where such hearings are often conducted prior to trial so that the parties and the Court can understand the ground rules. I also think that Rule 702 and the *Kumho Tire Daubert* line of cases do require me to make preliminary findings regarding the qualification of experts, the relevance of their testimony, and the reliability of their testimony. So I do believe I have the authority to resolve these Rule 702 issues prior to trial. And the fact that the disclosures that would have to be made to satisfy Rule 702 and Daubert, the fact that they're essentially if they're not very similar to or identical to, they're very close to what's specified in Rule 16 does not foreclose me from ordering such a disclosure pretrial.

As a result, I am including expert witness disclosures within the existing trial schedule. Anyone seeking to present expert testimony at trial must present disclosures in accordance with the current version of Rule 16 on or before November 4. Any rebuttal disclosures or request for *Daubert* motions will be submitted on or before November 11, and we'll hold the *Daubert* hearing at or in the same week as the final pretrial conference on November 19. I say possibly in the same week because I don't know what the parties are going to be

submitting to me, so I don't know whether this can all be done in one afternoon or requires multiple afternoons. I have here really thoughtful stuff about the advice of counsel defense, but I'll stop because the parties have made agreements on it. I'll just say this, please, and I'm sure that this is just me being unnecessarily worried. When I'm using the term "advice of counsel defense," what I'm really speaking about are two things. And one of them is the formal advice of counsel defense that's noted in cases like *Bilzerian* and that requires certain disclosures by the defense and certain findings by the court before such a defense can be raised.

But I'm also talking about cases in which someone is arguing that the presence of lawyers or their participation in meetings might impact a defendant's intent. So when I'm asking for advice of counsel disclosures on or before October 28, what I'm really talking about is any reference to counsel being present, being in the room, and any arguments that you make from that. I just say that because while I'm familiar, very familiar with the advice of counsel defense, I've had instances in which litigants have wanted to just do this variant of advice of counsel. And I've read a recent decision from Judge Kaplan in the *Bankman-Fried* litigation. And there contained at 2023 WL 6392718 and 2024 WL 477043. And I take his point about the, perhaps the near co-extensiveness of both formal and informal advice of counsel. But I'm really telling you this

because I don't want to be surprised at trial. So if we're going to talk about lawyers, please tell me before trial. All right.

Let me just say this one other thing. And, you know, I wrote this earlier today before we had this very congenial conversation. So I'm going to just give this to you and hope that it is already dated even as I say it. Here's what I wrote. I'm ending with this thought, which like a few others I've expressed this afternoon may not be something that anyone asked for. This case is an interesting case. This is an important case, and I'm just one person thinking about this. I think it's a triable case. My concern about this most recent round of motion practice is that the parties are planning to engage in a trial by ambush in the hopes of either gaining some advantage from the jury or gaining some advantage from me by making it more difficult for their advisory to respond. And my thought to you here is that I don't think you need to engage in litigation with parlor tricks.

And I'll say on this point that if you make life a little bit more difficult for your adversary, if you give them less time to look at something, I care less about that. What I really care about is that you're not going to give me enough time to think about these issues, and you're not going to give me enough time to arrive at a correct decision on your applications. I also actually don't think that late breaking

changes in strategy or gotcha moments actually really help anyone for trial fortune turn around. It didn't work for Mr. Bankman-Fried for instance. I'm asking you to play well with each other as best you can. And I'm asking you to spend maybe a little bit less time on strategic thinking and a little more time on the substance of the case. But perhaps today is the conversation we needed to air things out. Perhaps today we realize we can work together, and we can focus on the really important substantive issues that are going to take place in this trial. And that really is my hope. But for now, I resolve the motions that I have in front of me. I don't think there are open issues. But, Mr. Rehn, let me ask you now if there are from your perspective?

MR. REHN: Not from our perspective at this time, your Honor. Thank you.

THE COURT: Okay. And, Mr. Klein, any from your perspective at this time?

MR. KLEIN: No, your Honor.

THE COURT: Okay. Then I will let you go forth and continue to prepare for this trial. I am assuming that we are having a trial on December 2nd. You'll of course let me know if that changes.

Thank you all very much. Thank you. Genuinely, thank you for the comprehensiveness of your submissions, and for the argument that you made to me which I really feel covered the

landscape. I really appreciate that. We'll talk again as needed. We are now adjourned. Thank you.

(Adjourned)